Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

91 1034

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GENERAL DYNAMICS CORPORATION
and UNISYS CORPORATION,
Petitioners,

v.

LAWRENCE M. BAREFORD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

HERBERT L. FENSTER
Counsel of Record
RAYMOND B. BIAGINI
WILLIAM R. STOUGHTON
JOSEPH F. GAGEN, JR.

McKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does Federal Rule of Civil Procedure ("Rule") 41(a)(1)(i) permit judge-shopping by the simultaneous filing of multiple, identical civil actions in different federal courts, and by the voluntary dismissal of the one before the less-favored judge, or is such activity prohibited by Rule 11 and 28 U.S.C. § 1927 (1988)?

2. May an attorney avoid the obligation under Rule 11 to sign papers filed in federal court by delegating that responsibility to a secretary?

PARTIES TO THE PROCEEDINGS

Pursuant to Sup. Ct. R. 29.1, Petitioners submit that they were the only Appellants to the United States Court of Appeals for the Fifth Circuit, and have no parent or subsidiary companies. Hughes Aircraft Company, whose parent company is General Motors Corporation and whose fellow subsidiary is Electronic Data Systems Corp. ("EDS"), was also a Defendant in the District Court but elected not to appeal to the Fifth Circuit.

In addition to the party named in the caption to the petition, Appellees to the Court of Appeals for the Fifth Circuit included:

Roland W. Bolduc
Estate of Doran Bolduc
Mrs. Roland Bolduc

Leonard Calkins
Estate of Jeffrey L. Calkins
Mrs. Leonard Calkins

Robert A. Caouette
Mark Robert Caouette
Mrs. Robert A. Caouette

Kathleen Ciletta
Estate of John A. Ciletta

Robert DeAngelis
Estate of Christopher DeAngelis
Mrs. Robert DeAngelis

Rodney Erwin
Estate of Steven Thomas Erwin
Mrs. Rodney Erwin

Shirley Jean Farr
Estate of Jerry Boyd Farr
Kassandra Anne Farr
Mr. and Mrs. Wilson P. Farr

Karen Gangidine
Estate of Martin Supple

Nathan Grissette, Jr.
Estate of Dexter D. Grissette
Mrs. Nathan Grissette, Jr.

Frances Homicki
Estate of Daniel Homicki
Laura T. Homicki

Kenneth D. Janusik
Estate of Kenneth D. Janusik
Mrs. Kenneth D. Janusik

Diane P. MacMullen
Estate of Thomas J. MacMullen
Deborah A. MacMullen
Lauren E. MacMullen

Walter S. Phelps, III
Estate of Jeffrey Lee Phelps
Mrs. Walter S. Phelps, III

Diana Lynn Pierce
Estate of Randy E. Pierce
Randi Lynn Pierce
Logan Mitchell Pierce
Mr. Donald W. Pierce

Robert Quick
Estate of Kelly R. Quick
Karen Jean Welch

Vera Jane Ryals
David Zuckerbraun
Estate of Earl Patton Ryals

Carol A. Shippee
Estate of Robert L. Shippee
Patricia C. Shippee
Timothy M. Shippee
Brian R. Shippee

Roger Stephens
Estate of Lee Stephens
Mrs. Roger Stephens

Bobby G. Stevens
Estate of James R. Stevens
Mrs. Bobby G. Stevens

Alfred Ulmer
Estate of Vincent L. Ulmer
Mrs. Alfred Ulmer

Lori E. Weaver
Estate of Wayne R. Weaver, II
Patty J. Strong

James R. Wheeler

Joseph E. Wilson
Estate of Lloyd A. Wilson
Mrs. Mamie E. Wilson

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
I. THE FIFTH CIRCUIT IMPERMISSIBLY IGNORED THE ANALYTICAL FRAMEWORK ESTABLISHED IN *COOTER & GELL* TO PERMIT THE USE OF RULE 41(a)(1)(i) FOR THE PURPOSE OF JUDGE-SHOPPING, IN VIOLATION OF RULE 11 AND 28 U.S.C. § 1927	11
A. The Fifth Circuit's Decision is Contrary to Supreme Court Precedent	11
B. The District Court Erroneously Concluded that the Availability of a Voluntary Dismissal Permitted Judge-Shopping and Shielded Counsel from Rule 11's "No Improper Purpose" Requirement	12
C. The Fifth Circuit Failed to Distinguish Error of Law From Unrelated Factual Finding	13
D. The Use of Rule 41 for the Purpose of Judge-Shopping is Inconsistent With Law, Unnecessarily Burdens the Courts, and Diminishes Confidence in our Legal System	14

TABLE OF CONTENTS—Continued

Page

E. The Lower Courts also Erroneously Concluded that 28 U.S.C. § 1927 Permits Multiple Filings for the Purpose of Judge-Shopping.... 17

II. THE PLAIN MEANING OF RULE 11 REQUIRES AN ATTORNEY OF RECORD TO SIGN EVERY PLEADING 18

CONCLUSION 22

APPENDIX

Bareford v. General Dynamics Corp., No. 90-4899 (5th Cir. Sept. 27, 1991) (per curiam) 1a

Bareford v. General Dynamics Corp., No. TY-90-188-CA (E.D. Tex. Tyler Div. Oct. 12, 1990) 10a

Bareford v. General Dynamics Corp., No. TY-90-188-CA (E.D. Tex. Tyler Div. order May 7, 1990) (setting hearing on Rule 11 sanctions) 16a

Bareford v. General Dynamics Corp., No. TY-90-188-CA (E.D. Tex. Tyler Div. order May 11, 1990) (vacating May 7 order setting hearing on Rule 11 sanctions) 18a

Bareford v. General Dynamics Corp., No. TY-90-188-CA (E.D. Tex. Tyler Div. order Aug. 15, 1990) (setting hearing on motion for sanctions) 19a

Letter from Michael J. Maloney, Esq., Fisher, Gallagher, Perrin & Lewis, to Hon. William M. Steger, U.S. District Judge, Eastern District of Texas, regarding multiple filing of petition (May 10, 1990) 20a

Affidavit of Michael J. Maloney, Esq., No. TY-90-188-CA (E.D. Tex. Tyler Div. aff. entered May 11, 1990) 22a

Bareford v. General Dynamics Corporation, No. TY-90-188-CA (E.D. Tex. Tyler Div. notice of dismissal May 7, 1990) 24a

Bareford v. General Dynamics Corp., No. TY-90-188-CA (E.D. Tex. Tyler Div. complaint filed Apr. 26, 1990) 25a

TABLE OF CONTENTS—Continued

Page

Bareford v. General Dynamics Corp., No. B-90-00286-CA (E.D. Tex. Beaumont Div. complaint filed Apr. 26, 1990) 27a

Bareford v. General Dynamics Corp., No. G-90-118 (S.D. Tex. Galveston Div. complaint filed Apr. 26, 1990) 29a

TABLE OF AUTHORITIES

Cases Page

Beatty v. Chesapeake Center, Inc., 835 F.2d 71 (4th Cir. 1987) 16

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 111 S. Ct. 922 (1991) 10, 21

Cheeseman v. Carey, 485 F. Supp. 203 (S.D.N.Y.), *remanded on other grounds with direction to dismiss*, 623 F.2d 1387 (2d Cir. 1980) 16

Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990) ..... *passim*

Day v. Amoco Chemicals Corp., 595 F. Supp. 1120 (S.D. Tex.), *appeal dismissed*, 747 F.2d 1462 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086 (1985) 17, 18

Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989) ..... *passim*

Rubin v. United States, 449 U.S. 424 (1981) 18

Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988) 12

United States v. B.F. Goodrich Co., 41 F. Supp. 574 (S.D.N.Y. 1941) 16

United States v. Lulac, 793 F.2d 636 (5th Cir. 1986) 16

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 18

Statutes

28 U.S.C. § 1254(1) (1988) 2

28 U.S.C. § 1332 (1988) 3

28 U.S.C. § 1927 (1988) ..... *passim*

Rules

Fed. R. Civ. P. 11 ..... *passim*

Fed. R. Civ. P. 41 ..... *passim*

Fed. R. Civ. P. 41(a)(1) ..... *passim*

Fed. R. Civ. P. 41(a)(1)(i) ..... *passim*

Fed. R. Civ. P. 41(d) 15

D. Alaska R. 4(A) 16

D. Ariz. R. 3(c) 16

TABLE OF AUTHORITIES—Continued

	Page
D. Ark. R. 6(b)	17
C.D. Cal. R. 4.2.1	17
S.D. Cal. R. 205(1)	17
D. Colo. R. 200(A)(1)	17
D. Conn. R. 10(d)(2)	17
D.D.C. R. 403(a)	17
M.D. Fla. R. 1.03(b)	17
S.D. Fla. R. 4(C)	17
N.D. Ill. R. 2.00	17
S.D. Ind. R. A-3(e)	17
D. Mass. R. 40.1(A)(3)	17
W.D. Mich. R. 6(c)	17
D. Minn. R. 40.1(a)	17
E.D. Mo. R. 11(B)	17
E.D. Mo. R. 11(C)	17
W.D. Mo. R. 35	17
D. Neb. R. 11(c)	17
E.D.N.Y. R. 50.2(b)	17
S.D.N.Y. R. 50.2(b)	17
N.D. Ohio R. 7.01	17
E.D. Pa. R. 3(b)(1)	17
W.D. Pa. R. 35(c)	17
D.P.R. R. 302(1)	17
D.R.I. R. 7(c)(1)	17
M.D. Tenn. R. 6(a)	17
W.D. Tenn. R. 3(a)(1)	17
D. Utah R. 107(a)(1)	17
E.D. Wis. R. 4.01	17
D. Wyo. R. 202(a)(1)(i)	17

Other Authority

Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 Yale L.J. 677 (1984)	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ——

GENERAL DYNAMICS CORPORATION
and UNISYS CORPORATION,
Petitioners,

v.

LAWRENCE M. BAREFORD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

General Dynamics Corporation and Unisys Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (reproduced in the Appendix to this Petition ("App.") at 1a) was not published. The Findings of Fact and Conclusions of Law of the United States District Court for the Eastern District of Texas at Tyler denying Petitioners' motion for sanctions, (App. at 10a), also were not published.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 27, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

Rule 11 of the Federal Rules of Civil Procedure provides in relevant part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading . . .; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 41(a)(1) of the Federal Rules of Civil Procedure provides in relevant part:

> [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . . Unless otherwise stated in the notice of dismissal or stipulation, the dis-

> missal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

28 U.S.C. § 1927 (1988) provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

On May 17, 1987, an Iraqi aircraft launched a missile attack on the U.S.S. Stark, killing thirty-seven sailors and injuring others. Relatives of several of the deceased sailors, and two of the injured sailors, retained counsel ("Plaintiffs' counsel"), to file suit on their behalf. Plaintiffs' counsel elected to sue military equipment contractors purportedly involved in the design, manufacture, testing and installation of the U.S.S. Stark's defensive weapons systems, on various product liability and fraud theories.

On Thursday, April 26, 1990, Plaintiffs filed three identical civil actions that named eleven defendants, including General Dynamics Corporation, Unisys Corporation, and Hughes Aircraft Company, in three different federal district courts in Texas. Plaintiffs filed first in the Eastern District of Texas at Tyler at 9:34 a.m. on April 26th.[1] Plaintiffs filed an identical complaint in the Eastern District of Texas at Beaumont at 11:09 a.m. on April 26th. Plaintiffs filed a third identical complaint in the Southern District of Texas at Galveston. The Galves-

---

[1] In each complaint, Plaintiffs asserted that subject matter jurisdiction existed in federal district court pursuant to 28 U.S.C. § 1332 (1988). The first page and signature page of the complaints appear in the Appendix. (App. at 25a, 27a, 29a.)

ton district court does not time stamp complaints, but the complaint was date stamped April 26, 1990. Each of the three complaints was properly captioned for the court in which it was filed, and each complaint included a unique signature page bearing the apparent signatures of three attorneys from the law firm retained by Plaintiffs. The cases were assigned to judges as a matter of course. Plaintiffs' counsel never commenced service of the original complaint in any of the three civil actions.

On May 1, 1990, Chief Judge Robert Parker of the Eastern District of Texas dismissed the Beaumont complaint as duplicative of, and later filed than, the Tyler action. On May 4, 1990 (aware of the Beaumont dismissal), Plaintiffs voluntarily dismissed the complaint pending before the district court in Tyler, citing Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure. (App. at 24a.) As a result, Plaintiffs were able to proceed with their action before the judge assigned in the Galveston case.

That same day the Tyler court ordered Plaintiffs' counsel to appear and to show cause why sanctions should not be imposed. (App. at 16a.) The Tyler court, at that time still unaware of the filing in Galveston, viewed the filing of even the two identical complaints in Tyler and Beaumont "as raising the question of whether the plaintiffs have engaged in an attempt to thwart the case assignment process used in the Eastern District of Texas and engage in impermissible forum shopping." (*Id.*) The Tyler court directed Plaintiffs' counsel to show: (1) whether cases alleging identical claims and plaintiffs had been filed in other districts or states; and (2) "which of those cases, if any, ha[d] been voluntarily dismissed by a plaintiff or plaintiffs." (*Id.* at 17a.)

In a letter to the Tyler court dated May 10, 1990, Plaintiffs' counsel responded to the district court's order. In relevant part, the letter stated:

> As I explained to [Judge Steger's law clerk], my intent was to file this case in Beaumont, Texas. On

> my instructions, my secretray [sic] filed it in Beaumont on April 26, 1990. Unfortunately, I have a new paralegal, recently with a Dallas firm, who employed commendable but regretable [sic] initiative. Thinking that the Eastern District was in Tyler, she filed the same petition in Tyler. As soon as I was advised that the Beaumont matter was dismissed by Judge Parker, I filed a voluntary notice of dismissal under Rule 41(a)(1).
>
> . . . .
>
> We are temporarily refraining from filing in Houston Federal Court because of the severely overloaded docket there. The matter is now filed in the Galveston District Court.

(App. at 20a-21a.)

An affidavit accompanying the letter stated that the voluntary dismissal of the action in Tyler was the only voluntary dismissal of the action, and that the only place in which the matter was then filed was in Galveston, Texas. (App. at 22a-23a.) Based on counsel's representations, the court vacated its show cause order and ruled that Plaintiffs had "not engaged in impermissible forum shopping to date." (App. at 18a.)

Upon learning of the letter and affidavit, counsel for General Dynamics, Unisys and Hughes Aircraft first became aware that a civil action had been filed in Galveston. Counsel subsequently learned that the complaint there had also been filed on April 26, 1990. On May 15, 1990, believing that the Tyler court had been misled, counsel for the companies, acting as officers of the court, called the court's attention to the simultaneous filing of the Galveston complaint in a filing entitled "Praecipe." The Tyler court took no action on counsels' filing.

On May 17, 1990, Plaintiffs amended the complaint filed in Galveston and commenced service. Shortly thereafter, General Dynamics, Unisys, and Hughes Aircraft, among others, were served with Plaintiffs' First Amended Complaint.

On June 28, 1990, General Dynamics, Unisys, and Hughes Aircraft moved for sanctions in the Tyler court pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. The companies sought sanctions in Tyler as the court in which the action apparently was first filed, and as the court in which the normal judicial assignment process was avoided by voluntary dismissal.[2] The three companies also sought sanctions for the misleading nature of the May 10, 1990 letter to the Tyler court.

The Tyler court held an evidentiary hearing on August 24, 1990, at which Plaintiffs' lead counsel and his secretary testified as to the circumstances of the multiple filings and subsequent correspondence to the court. Plaintiffs' lead counsel stated that "[i]t was my intention to file two [complaints] simultaneously in accordance with Rule 41 and then dismiss one voluntarily as the Rule provides." Transcript of August 24, 1990 Hearing Before the Hon. William M. Steger at 12. Plaintiffs' lead counsel further indicated that one voluntary dismissal pursuant to Rule 41(a)(1) can be taken for any reason, including judge-shopping, prior to the filing of an answer or a motion for summary judgment. *Id.* at 47-50. The court again expressed its concern for the abuse of process it believed had occurred:

> There has been a lot of work involved in the Court. And our time is important here and our clerks are highly overworked. We're understaffed, and we do not need attorneys filing lawsuits that they have no intention of pursuing.
>
> . . . .

---

[2] On June 28, 1990, the companies also advised the Beaumont and Galveston courts of the filing of the sanctions motion in Tyler. The companies served copies of those notifications on Plaintiffs' counsel.

> I am concerned with orderly conducting of the Court in the part that I play in it. That is why we are here.
>
> . . . .
>
> In addition, I might say that it is an abuse of the system that we have that's available to litigants.

Id. at 94-95.

The court and Defendants also learned for the first time at the evidentiary hearing that no attorney of record had signed any of the pleadings. The testimony of Plaintiffs' lead counsel and his secretary revealed that Plaintiffs' lead counsel directed his secretary to sign each of the complaints on his behalf. *Id.* at 15, 17. Plaintiffs' lead counsel was attending depositions in Houston at the time and elected not to return to his office to sign, and did not personally ever sign, the complaints. *Id.* at 17. The secretary then had the secretaries for the other attorneys identified on the complaints sign for those attorneys. *Id.* at 74. No attorney signed any of the three complaints, nor did any of those attorneys see the complaints again before filing. *Id.* at 25-26, 29-30, 74-75. None of the complaints indicated by initials or otherwise that the signatures were not those of the attorneys named. (App. at 25a, 27a, 29a.)

On October 12, 1990, the Tyler court filed findings of fact and conclusions of law and an order denying the companies' sanctions motion. (App. at 10a.) The court found as fact that the identity of the judges assigned in the multiple filings was a factor in counsel's decision as to which case to dismiss: Plaintiffs' counsel "intended to file two of the complaints, and partially depending on which two judges drew the cases, [he] would then dismiss one of the cases pursuant to Federal Rule of Civil Procedure 41(a)(1)(i)." (App. at 13a.) Notwithstanding that finding and its comments at the hearing, the Tyler court then held: (1) that none of the complaints was filed for an improper purpose, (*id.* at 15a); (2) that Rule

41(a)(1)(i) gave Plaintiffs an absolute right to a dismissal, (*id.* at 14a); (3) that counsel did not deceive the court as to the circumstances of the multiple filings, (*id.* at 15a); and (4) that a secretary's signature at the direction of counsel satisfied Rule 11's signature requirement, (*id.*). The court also found that the Tyler filing was an unintentional mistake, and that counsel intended to file only two of the three complaints. (*Id.* at 13a.) Finally, the court found that the multiple filings did not violate 28 U.S.C. § 1927. (*Id.* at 15a.)

General Dynamics and Unisys appealed the denial of sanctions on the grounds that the district court erroneously interpreted Rule 41 to permit conduct that violated Rule 11 and 28 U.S.C. § 1927, and that the lack of an attorney's signature on the three complaints violated Rule 11.[3] Although it acknowledged the district court's specific finding that Plaintiffs' lead counsel intended to select one of the complaints for voluntary dismissal, depending in part on the identity of the judges assigned, (App. at 5a), the court of appeals affirmed the denial of Rule 11 sanctions, (*id.* at 7a-8a).

The court ruled that because the district court found that the Tyler filing was a mistake,

> [w]e therefore need not assess the effect under Rule 11 of multiple filings in various district courts, as it was not necessary for Judge Steger, having found that the filing in his court was simply a mistake, to pass judgment upon the effect of plaintiffs' counsel's filings in other courts. If, indeed, there was any sanctionable conduct in those courts—and we do not suggest that there was—it would be more appropriately addressed by a court directly concerned with something more than a mistake.

(*Id.*) The court similarly rejected the companies' assertion that Plaintiffs' counsel had violated 28 U.S.C. § 1927.

---

[3] Hughes Aircraft Company elected not to appeal.

(*Id.* at 8a.) The court did not address the district court's finding that, in addition to the Tyler filing, counsel for Plaintiffs simultaneously filed two other identical complaints in Beaumont and Galveston.

Finally, the court of appeals rejected the companies' argument that the plain meaning of Rule 11 requires an attorney of record to sign every pleading.

> While we wish to emphasize that under normal, and even abnormal, circumstances it is the attorney's obligation to ensure that his own signature appears on the pleadings, motions and other papers, we find no basis in Rule 11 from which to conclude that a pleading filed by mistake should lead to sanctions for lack of an attorney signature, especially where the mistake was unrelated to the lack of a signature.

(App. at 8a.)

REASONS FOR GRANTING THE PETITION

The lower courts' decisions in this case pose novel questions on the meaning and implementation of Rule 11's requirements, with far-reaching consequences. The decisions below are an open invitation for plaintiffs to file multiple suits simultaneously in different federal district courts for the purpose of judge-shopping. If the lower court decisions are permitted to stand, federal courts already plagued by congested dockets will be further burdened with complaints that were never intended to be prosecuted. Moreover, the lower courts' decisions effectively legitimize a judge-shopping practice that undermines defendants' confidence in the fair and impartial forum created by the random assignment of cases to judges. Finally, the decisions run directly counter to recent Court precedent on the interrelationship of Rule 41(a)(1) and Rule 11.

The lower courts in this case also failed to accord Rule 11 its plain meaning with regard to signing of papers filed in federal court: Rule 11 requires that an

attorney—not a non-attorney subordinate—must sign every paper filed in federal court on behalf of a represented party. The court of appeals affirmed the district court's holding that a secretary's signature at an attorney's request satisfies Rule 11's signature requirement, particularly in the instance of a mistaken filing. These decisions are also contrary to recent Court precedent that links the responsibilities imposed by Rule 11 to the signing attorney or party involved, and makes those responsibilities non-delegable.

If permitted to stand, the decisions below would erode the effect of three recent Court decisions involving Rule 11, its role in maintaining the integrity of the judicial system, and its use to permit effective management of court dockets: *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989), *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), and *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991). In *Cooter & Gell*, a plaintiff's exercise of the right to voluntary dismissal pursuant to Rule 41(a)(1)(i) was held not to erase any violations of Rule 11 that may have resulted from a filing prior to that dismissal. In *Pavelic & LeFlore* and *Business Guides*, the Court held that the plain meaning of Rule 11 requires either an attorney of record, a represented party or both, as signer(s) of the pleading, to be solely responsible for any Rule 11 violations. This case poses equally important Rule 11 questions, with potentially greater impact on the district courts' ability to manage civil litigation. The Court should grant *certiorari* in this case to examine these novel questions and to foreclose erosion of the Court's recent and unambiguous decisions that interpret the interplay between Rule 11 and Rule 41, and that affirm the plain meaning of Rule 11.

I. THE FIFTH CIRCUIT IMPERMISSIBLY IGNORED THE ANALYTICAL FRAMEWORK ESTABLISHED IN *COOTER & GELL* TO PERMIT THE USE OF RULE 11(a)(1)(i) FOR THE PURPOSE OF JUDGE-SHOPPING, IN VIOLATION OF RULE 11 AND 28 U.S.C. § 1927

A. The Fifth Circuit's Decision is Contrary to Supreme Court Precedent

This Court recently addressed the relationship between Rule 41(a)(1) and Rule 11 in *Cooter & Gell*, 110 S. Ct. 2447. In that case, the Court held that while Rule 41(a)(1) grants a plaintiff the right to dismiss a complaint without prejudice before an answer or motion for summary judgment is filed, the court from which the complaint was dismissed retains jurisdiction for purposes of considering whether any Rule 11 violation has occurred. That result flowed directly from the purpose of Rule 11: "[T]he central purpose of Rule 11 is to deter baseless filings in District Court and thus . . . streamline the administration and procedure of the federal courts." 110 S. Ct. at 2454. "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred." *Id.* at 2457.[4]

The lower courts' decisions encourage conduct directly in conflict with Rule 11's purposes, and result in precisely the type of harm to the judicial system that Rule 11 seeks to deter: potentially twice the number of complaints being filed in federal district court, half of which plaintiffs intend *not* to pursue.

---

[4] The *Cooter & Gell* decision dispelled any notion that a defendant must be prejudiced in order for a Rule 11 violation to have occurred. *See* 110 S. Ct. at 2157. The fact that Plaintiffs in this case did not serve the original complaints, therefore, does not preclude the Rule 11 violation.

The lower courts reached this result by ignoring the analytical framework established by this Court. The Court instructed that Rule 41 must be read in conjunction with Rule 11 to prevent abuse of judicial process, not to insulate it from review. *Cooter & Gell*, 110 S. Ct. at 2456-57 ("Both Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system . . . ."). "As the 'violation of Rule 11 is complete when the paper is filed,' a voluntary dismissal does not expunge the Rule 11 violation." *Id.* at 2455 (citation omitted) (quoting *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988)). The Court concluded: "Rule 41(a)(1) does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers." *Id.* at 2457. Lower courts must analyze whether Rule 11 has been violated independent of a plaintiff's subsequent decision to dismiss a case voluntarily. In this matter, the lower courts failed to perform the analysis outlined in *Cooter & Gell*, and thus reached a result squarely at odds with the purposes of Rules 11 and 41.

B. The District Court Erroneously Concluded that the Availability of a Voluntary Dismissal Permitted Judge-Shopping and Shielded Counsel from Rule 11's "No Improper Purpose" Requirement

The district court erred as a matter of law when it relied on a plaintiff's "absolute" right to a voluntary dismissal as an effective bar to the imposition of Rule 11 sanctions for the simultaneous filing of multiple complaints. The district court held that Rule 41(a)(1)(i) gives a plaintiff an *absolute* right to dismiss an action one time. (App. at 14a.) Presumably based on its conclusion that Rule 41 permitted dismissal for any reason, including judge-shopping, the court then held that the multiple complaints in this matter had not been filed for an improper purpose. (*Id.* at 15a.) The court effectively ruled that Rule 41 can convert a plainly improper filing

into one that is proper under the Federal Rules of Civil Procedure. Under the *Cooter & Gell* analysis, however, the proper question is not whether a plaintiff is permitted to dismiss one of its complaints. Rather, the question is whether the filing of multiple complaints simultaneously in order to judge-shop is a proper purpose for filing a civil action that the plaintiff intends *not to* pursue.

C. The Fifth Circuit Failed to Distinguish Error of Law From Unrelated Factual Finding

The court of appeals similarly failed to perform the proper analysis, ruling instead that it need not address whether multiple filings in various district courts for the purpose of judge-shopping violated Rule 11, because the district court did not abuse its discretion in concluding that the Tyler filing was a mistake. (App. at 7a-8a.) While the standard of appellate review in Rule 11 cases is abuse-of-discretion, *Cooter & Gell*, 110 S. Ct. at 2461, "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Id.* "[T]his standard would not preclude the appellate court's correction of a district court's legal errors." *Id.* at 2459.

The Fifth Circuit erroneously concluded that the questions of law presented for review were inseparable from the Tyler court's finding that, of the three complaints filed, the complaint filed in Tyler was a mistake. However, the district court did not rely on the mistaken nature of the Tyler complaint in denying the sanctions motion; it relied on its legal conclusion that Rule 41's right to dismissal was absolute even if that dismissal permitted a judge-shopping scheme to be carried out.

The Fifth Circuit further suggested that because the district court found that the Tyler filing was a mistake, Defendants more properly should have raised any Rule 11 concerns implicated by simultaneous multiple filings in one of the other district courts targeted for judge-

shopping. However, whether the Tyler filing was or was not one of the original jurisdictions selected for the judge-shopping scheme, the fact remains that judge-shopping occurred there because the Tyler complaint was filed, then voluntarily dismissed pursuant to Rule 41 in favor of the Galveston action. The flawed execution of Plaintiffs' counsels' original judge-shopping plan hardly excuses the improper purpose of the multiple filings, including the filing in Tyler. Further, the Tyler complaint was the first filed of the two complaints in the Eastern District of Texas. Chief Judge Parker's order dismissing the later-filed Beaumont case implicitly recognized the propriety of conducting *all* proceedings in the court where the duplicative actions were first filed. Under these circumstances, the Tyler court had full authority to consider whether the multiple filings violated Rule 11, and it conducted its legal analysis on that basis.

If permitted to stand, the Fifth Circuit's erroneous reasoning will also create practical problems affecting both the courts and litigants. Beyond affirming the district court's decision permitting multiple filings in order to judge-shop, the Fifth Circuit's approach worsens the docket congestion of the courts by effectively requiring that multiple filings be challenged in *each* district court where a filing occurred, so that at least one court will have an "unmistaken" filing before it. Rather than deterring improper conduct, the lower court rulings countenance the use of Rule 41(a)(1)(i) to undermine the integrity of the judicial system.

D. The Use of Rule 41 for the Purpose of Judge-Shopping is Inconsistent With Law, Unnecessarily Burdens the Courts, and Diminishes Confidence in our Legal System

Rule 41 has proper uses that are consistent with Rule 11's requirements. Rule 41 permits sequential filings, but not simultaneous filings. *See generally Cooter & Gell,*

110 S. Ct. at 2457 ("Rule 41(a)(1) was not designed to give a plaintiff any benefit other than the right to take one such dismissal without prejudice."). One of the crucial distinctions between the proper and improper uses of Rule 41 is that multiple filings which Rule 41 permits occur one at a time, with the voluntary dismissal between the two filings, so that there is never more than one action pending in federal district court. The dissent in *Cooter & Gell* stated that the intent of Rule 41(a)(1) is to entitle a plaintiff to dismiss where he has "reconsider[ed] his decision to file suit," 110 S. Ct. at 2463 (Stevens, J., concurring in part and dissenting in part), or where he wishes to "avoid further proceedings on the basis of that complaint," *id.* Neither of these objectives is accomplished when the voluntary dismissal is preceded by simultaneous filing of identical complaints.[5] The majority concluded that "Rule 41(a)(1) does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers." *Id.* at 2457.[6]

Beyond their obvious and unnecessary burden to the dockets of the district courts, simultaneous multiple filings for the purpose of selecting the judge before whom a case will be heard are particularly repugnant to the fair administration of justice. The random assignment of judges plays a fundamental role in assuring all plaintiffs and defendants that the judicial forum is a neutral one. "[L]awyers may be tempted to try to have a case assigned to a judge whom they view as receptive to their cause.

---

[5] Notably, all of the factors important to traditional "forum" selection, such as the choice of a jurisdiction with favorable legal precedent, with a favorable trial calendar, or to which plaintiffs could conveniently and inexpensively travel, can be considered before filing and certainly without simultaneous filings.

[6] The plain language in other subsections of Rule 41 further evidences an intent to permit sequential, and not simultaneous, filings. Rule 41(d) provides for payment of costs of the action "*previously* dismissed" by a plaintiff who refiles the same claims against the same defendant. (Emphasis added).

Nevertheless, such efforts are properly spurned on the ground that all judges are competent to decide cases." Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 Yale L.J. 677, 706 n.183 (1984) (citation omitted). Judge-shopping through the filing of multiple complaints, and the use of voluntary dismissal to effect this purpose, must be *per se* improper.

Judge-shopping traditionally has been rejected by the courts in their decisions and in their rules. Parties to an action "have no greater right to avoid appearing before a particular judge *than they have to select one*." *United States v. Lulac*, 793 F.2d 636, 645 (5th Cir. 1986) (emphasis added). Random assignment of judges to civil actions is one of the fundamental techniques used by courts to assure the parties of fairness in the judicial system. *See Beatty v. Chesapeake Center, Inc.*, 835 F.2d 71, 75 n.1 (4th Cir. 1987) (en banc) (Murnaghan, J., concurring) ("One of the Court's techniques for promoting justice is randomly to select panel members to hear cases . . . ."); *Cheeseman v. Carey*, 485 F. Supp. 203, 215 (S.D.N.Y.) ("[T]his district's local rules are designed to prevent shopping for individual judges and thereby for the application of some anticipated view of the law . . . ."), *remanded on other grounds with direction to dismiss*, 623 F.2d 1387 (2d Cir. 1980); *see also United States v. B.F. Goodrich Co.*, 41 F. Supp. 574, 575 (S.D.N.Y. 1941) ("Obviously, under the general rule well known and so long adhered to, one plaintiff should not be permitted to bring and maintain at the same time more than one action for the same relief.").[7]

[7] Petitioners believe random assignment is the practice in nearly every federal district court. Many district courts expressly provide for random assignment in their local rules. *See* the local rules of the following district courts: Alaska (Rule 4(A)); Arizona (Rule 3(c)) (assignment "according to lot and in a manner so that neither the clerk nor any of the parties or their attorneys shall be able to make a deliberate choice of a particular judge for a par-

E. The Lower Courts also Erroneously Concluded that 28 U.S.C. § 1927 Permits Multiple Filings for the Purpose of Judge-Shopping

The district court also held that no violation of 28 U.S.C. § 1927 had occurred and the court of appeals affirmed. (App. at 15a, 8a.) Contrary to the district court's decision, section 1927 provides further justification for the imposition of sanctions in the present matter. Section 1927 sanctions are appropriate when an abuse of judicial process is coupled with bad faith. *See Day v. Amoco Chemicals Corp.*, 595 F. Supp. 1120, 1123 (S.D. Tex.), *appeal dismissed*, 747 F.2d 1462 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086 (1985).

In *Day*, plaintiff's suit was determined to be frivolous. In imposing sanctions under 28 U.S.C. § 1927, the court stated:

> The spirit of the rules should be enforced . . . to prevent the exploitation of a judicial system already weighted to the breaking point with legitimate claims. The Court's valuable time should not be wasted on harassing, annoying lawsuits such as the one filed by

---

ticular case"); Arkansas (Rule 6(b)) ("No person shall take any action designed to cause the assignment of any proceeding to a particular judge."); Central District of California (Rule 4.2.1); Southern District of California (Rule 205(1)); Colorado (Rule 200(A)(1)); Connecticut (Rule 10(d)(2)); District of Columbia (Rule 403(a)); Southern District of Florida (Rule 4(C)); Middle District of Florida (Rule 1.03(b)); Northern District of Illinois (Rules 2.00-.02); Southern District of Indiana (Rule A-3(e)); Massachusetts (Rule 40.1(A)(3)); Western District of Michigan (Rule 6(c)); Minnesota (Rule 40.1(a)); Western District of Missouri (Rule 35); Eastern District of Missouri (Rule 11(B), (C)); Nebraska (Rule 11(C)); Southern and Eastern Districts of New York (Rule 50.2(b)); Northern District of Ohio (Rule 7.01); Eastern District of Pennsylvania (Rule 3(b)(1)); Western District of Pennsylvania (Rule 35(C)); Puerto Rico (Rule 302(1)); Rhode Island (Rule 7(c)(1)); Middle District of Tennessee (Rule 6(a)); Western District of Tennessee (Rule 3(a)(1)); Utah (Rule 107(a)(1)); Eastern District of Wisconsin (Rule 4.01); Wyoming (Rule 202(a)(1)(i)).

> plaintiff. In an effort to deter such claims, sanctions should be imposed upon the instigator of the afflicting and disrupting action where the court finds that the judicial process is being exploited and abused.

595 F. Supp. at 1123.

The filing of several identical complaints simultaneously is an obvious multiplication of the proceedings, which is inherently unreasonable. Moreover, because multiple filings serve no legitimate purpose, those filings must be deemed to have been made in bad faith. The multiple filings here can only be explained as an abuse of judicial process for assignment of civil actions to district judges. The courts below ignored the plain meaning of 28 U.S.C. § 1927, and therefore reached an erroneous result.

II. THE PLAIN MEANING OF RULE 11 REQUIRES AN ATTORNEY OF RECORD TO SIGN EVERY PLEADING

This petition also presents the issue of whether papers not signed by any attorney, and instead signed by a secretary at an attorney's request, comply with Rule 11's express requirements. The first sentence of Rule 11 states that "[e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated." The natural language can be given no other meaning than to require that an attorney—not a secretary or other non-attorney—sign every pleading.

The lower courts' rulings on this question substantially depart from this Court's recent decisions construing Rule 11. "We give the Federal Rules of Civil Procedure their plain meaning, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980), and generally with them as with a statute, '[w]hen we find the terms . . . unambiguous, judicial inquiry is complete.'" *Pavelic & LeFlore*, 110 S. Ct. at 458 (quoting *Rubin v. United States*, 449 U.S.

424, 430 (1981)). The district court in this case concluded that

> although the original pleading filed in this case was not personally signed by any one of the three attorneys of record, the pleading was signed by each attorney's secretary in each attorney's name and at each attorney's request. This satisfies the requirement that every pleading, motion, or other paper must be signed by at least one attorney of record.

(App. at 15a.) The court of appeals affirmed, stating that "we find no basis in Rule 11 from which to conclude that a pleading filed by mistake should lead to sanctions for lack of an attorney signature, especially where the mistake was unrelated to the lack of a signature." (App. at 8a.) Petitioners submit that harm to judicial administration, which Rule 11 aims to deter, occurred in this case at the time the "machinery of justice" was triggered: when simultaneous complaints were filed.[8]

In *Pavelic & LeFlore*, this Court addressed whether Rule 11 envisions the imposition of sanctions on attorneys who did not actually sign the relevant filing but who were partners of an attorney who did sign. The plain meaning of the rule, the Court held, mandated that the signing attorney alone, and not the signing attorney's law firm, is subject to Rule 11 sanctions. The Court's reasoning makes clear the error of the district court and court of appeals in permitting three secretaries to sign multiple pleadings on behalf of three attorneys.

> [J]ust as the court expects the signer personally—and not some nameless person within his law firm—

---

[8] The Fifth Circuit apparently was concerned that the companies did not raise the fact that none of the pleadings was signed by an attorney until its post-hearing district court brief. (App. at 8a.) The lack of an attorney signature did not become known until the August 24, 1990 evidentiary hearing. The post-hearing brief was the first opportunity to raise the Rule 11 concerns implicated by the absence of an attorney's signature. The district court had no objection to the issue being raised at that time.

> to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him personally —and not his law firm—its retribution for failing in that responsibility. The message thereby conveyed to the attorney, that this is not a "team effort" but in the last analysis *yours alone*, is precisely the point of Rule 11.

110 S. Ct. at 460.

The text of Rule 11 requires the signature of an attorney if a party is represented by counsel. *Id.* Here, the absence of an attorney's involvement in the final steps of initiating the civil action—signing and filing the complaint—exacerbated the multiple filing problem.[9] Attorneys play a pivotal role in assuring the fair administration of justice, and requiring that an attorney sign a filing provides a final check that the filing is being made for a proper purpose, by one who must answer to the court. To accord Rule 11 its plain meaning, as this Court did in *Pavelic & LeFlore*, courts must require the attorney willing to take responsibility for the pleading, not a non-attorney subordinate, to sign the pleading. "[T]he purpose of Rule 11 as a whole is to bring home to the individual signer his *personal, nondelegable* responsibility." 110 S. Ct. at 460 (emphasis added).

Plaintiffs' lead counsel directed his secretary to sign each of the complaints and accepted full responsibility for the filings. Transcript of August 24, 1990 Hearing Before the Hon. William M. Steger at 94-95. That fact, however, does not cure the lower courts' error of law in permitting the practice of delegating Rule 11 signature authority. Rule 11's requirement that an attorney sign a pleading is uniquely different from other common-law

---

[9] Additional pre-filing involvement of an attorney may well have prevented the "mi-taken" Tyler filing. The signature of at least one of the three attorneys representing Plaintiffs would have provided the opportunity for that involvement.

situations in which delegation of signature responsibility might be acceptable:

> We are not dealing here, however, with common-law liability, but with a Rule that strikingly departs from normal common-law assumptions such as that of delegability. The signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment.

Pavelic & LeFlore, 110 S. Ct. at 459.

More recently, this Court reemphasized the significance of Rule 11's signature requirement. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991). In that case, the Court ruled that the plain meaning of the fifth sentence of Rule 11 "is that *any* party who signs a document, whether or not the party was required to do so, is subject to the certification standard of Rule 11." *Id.* at 930. The Court further explained that the 1983 amendments made clear that "[t]he essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit. A signature sends a message to the district court that this document is to be taken seriously." *Id.*[10] A non-attorney subordinate cannot make that representation.

Rule 11 requires an *attorney's* signature for a reason, and the failure to have at least one attorney sign the complaints violated Rule 11's requirement. The lower courts failed to accord Rule 11 its plain meaning, and for that reason their decisions should be reviewed by this Court.

---

[10] Although the dissent strongly objected to the majority's interpretation of Rule 11 exposing a represented party to Rule 11 liability, 111 S. Ct. at 935 (Kennedy, J., dissenting), the dissent's analysis reinforces the conclusion that the plain meaning of Rule 11 requires an attorney's signature. *See, e.g., id.* at 938 ("Rule 11 . . . requires a represented party's attorney to sign").

CONCLUSION

For the foregoing reasons, General Dynamics Corporation and Unisys Corporation request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

HERBERT L. FENSTER
Counsel of Record
RAYMOND B. BIAGINI
WILLIAM R. STOUGHTON
JOSEPH F. GAGEN, JR.

McKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Petitioners

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4899

LAWRENCE M. BAREFORD, *et al.*,
Plaintiffs-Appellees,

v.

GENERAL DYNAMICS CORP., *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas

(CA TY-90-CV-188)

[Entered September 27, 1991]

Before BROWN, KING and GARWOOD, Circuit Judges.
PER CURIAM:*

The plaintiffs filed three identical personal injury lawsuits against the defendants in three United States District Courts. The court dismissed one of the claims as duplicative, and the plaintiff dismissed a second, leaving the third to be adjudicated in the United States District Court for the Southern District of Texas at Galveston.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Dismayed by the multiple filings, the defendants moved for sanctions under Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 in the district court from which the plaintiffs had voluntarily dismissed their claim. The plaintiffs followed with their own Rule 11 sanctions motion. The district court denied both motions, and certain defendants [1] appealed. We affirm.

I. BACKGROUND

On April 26, 1990, attorneys for the plaintiffs filed three identical actions against 11 defendants, including General Dynamics Corp. and Unisys Corp., for personal injuries arising out of the May 17, 1987 Iraqi attack on the U.S.S. Stark in the Persian Gulf. One action was filed in the District Court for the Eastern District of Texas at Tyler (the "Tyler action"), one was filed in the District Court for the Eastern District of Texas at Beaumont (the "Beaumont action"), and one was filed in the District Court for the Southern District of Texas at Galveston.

The clerk's office for the Eastern District of Texas discovered the same-day filing of the Tyler and Beaumont actions, and referred the matter to Chief Judge Parker. On May 1, 1990, Chief Judge Parker decided that the first filed suit should remain on the docket and the second should be dismissed. As the Tyler action was filed earlier in the morning, the Beaumont action was dismissed. Three days later, on May 4, the plaintiffs filed a voluntary notice of dismissal of the Tyler action pursuant to Rule 41(a)(1)(i) of the Federal Rules. The suit filed in the Southern District at Galveston was not affected by these proceedings.[2]

---

[1] Only General Dynamics and Unisys are involved in this appeal.

[2] The Galveston action eventually was transferred to the United States District Court for the Southern District of Texas at Houston, and consolidated with an action that had been filed in

On the same day the plaintiffs dismissed the Tyler action (May 4), Judge Steger of the Tyler Division entered an order requiring that the parties appear for a hearing to determine whether sanctions were warranted for impermissible conduct.[3] Plaintiffs' counsel Michael Maloney, of the law firm Fisher, Gallagher, Perrin & Lewis, responded to the district court's order with a letter and affidavit on May 10. In the letter, he stated, in relevant part:

> . . . As I explained to [your law clerk], my intent was to file this case in Beaumont, Texas. On my instructions, my secretary filed in Beaumont on April 26, 1990. Unfortunately, I have a new paralegal. . . who employed commendable but regretable [sic] initiative. Thinking that the Eastern District was in Tyler, she filed the same petition in Tyler. As soon as I was advised that the Beaumont matter was dismissed by Judge Parker, I filed a voluntary notice of dismissal under Rule 41(a)(1).
>
> . . .
>
> We are temporarily refraining from filing in Houston Federal Court because of the severely overloaded docket there. The matter is now filed in the Galveston District Court. . . .

In the accompanying affidavit, Maloney stated that the only other related claim filed in any district or state was the Galveston action and that the plaintiffs had filed only

---

state court in Harris County, Texas and removed to the federal court in Houston.

[3] The court's order required the plaintiffs to show:

> (a) whether or not other cases have been filed in other districts or states in which any of the plaintiffs were the same as those pled in the cause of action [filed in Tyler] and alleging the identical claims set forth herein, and
>
> (b) which of those cases, if any, have been voluntarily dismissed by a plaintiff or plaintiffs.

one voluntary dismissal under Rule 41(a)(1). Based on these representations, Judge Steger on May 11 vacated his show cause order and ruled that the plaintiffs had "not engaged in impermissible forum shopping to date."

On May 15, the law firm of McKenna, Connor & Cuneo (now McKenna & Cuneo), together with local counsel, filed a document styled "Praecipe" in the district court in Tyler. Neither McKenna, Connor & Cuneo nor the local counsel represented any of the parties to the lawsuit at that time. The firms stated that "in the interests of fairness and proper administration of justice, we feel compelled to bring additional facts to the Court's attention," and went on simply to inform the court that the Galveston action (which had been described in Maloney's letter to Judge Steger) had been filed *on the same day* as the two actions in the Eastern District. They contended that "plaintiffs' counsel's actions in these matters raise serious questions of whether impermissible forum shopping has occurred."

On June 28, defendants General Dynamics, Unisys and Hughes Aircraft filed a motion in the district court at Tyler for sanctions against Maloney under Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927, and requested an evidentiary hearing.[4] The defendants sought sanctions for the simultaneous filing of three identical actions, for the misleading nature of Maloney's May 10 letter to the court and affidavit, and for lack of adequate factual investigation prior to filing of the complaints.[5] On August 20, the plaintiffs filed their own motion for Rule 11 sanctions, contending that the defend-

---

[4] The plaintiffs' voluntary dismissal of the action under Rule 41(a)(1) did not deprive the district court of jurisdiction to award sanctions. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2457 (1990).

[5] By this time, McKenna, Connor & Cuneo represented these defendants.

ants' actions were designed to harass the plaintiffs and gain an unfair advantage.[6]

Judge Steger held a hearing on August 24. Maloney testified that he had originally prepared four identical complaints with the intention of filing two, and that depending in part on which judges drew the case he would dismiss one pursuant to Rule 41(a)(1). Maloney further testified that the filing in Tyler was the inadvertent mistake of an overzealous paralegal. Maloney's secretary, Kate Dugas, testified that all three filed complaints were signed not by any of the three attorneys whose signatures appeared on the pleadings, but rather by their secretaries at the attorneys' request. The defendants submitted a post-hearing brief at which they argued the impropriety of plaintiffs' counsel allowing their secretaries to sign the original complaints.

Judge Steger denied both parties' motions for sanctions and issued findings of fact and conclusions of law in an order dated October 12. Judge Steger found that Maloney inadvertently filed the Tyler complaint, that the secretary for each attorney signed the attorney's name on the complaints at the attorney's request, that the plaintiffs conducted an adequate prefiling investigation despite the later amendment of their Galveston complaint, and that plaintiffs' counsel "did not intentionally mislead or misrepresent matters to this Court." Judge Steger then concluded, *inter alia*, that there had been no effort to file any pleading for an improper purpose or an attempt to multiply unreasonably the proceedings in the case. He there-

---

[6] Plaintiffs also responded to the defendants' sanctions motions, claiming that McKenna, Connor & Cuneo sought revenge against Maloney and his law firm because of a settlement in the "hotly contested" case of *Trevino v. General Dynamics Corp.*, 626 F. Supp. 1330 (E.D. Tex. 1986), *aff'd*, 865 F.2d 1474 (5th Cir.), *cert. denied*, 110 S. Ct. 327 (1989).

fore found no violation of Rule 11 or 28 U.S.C. § 1927. Defendants General Dynamics and Unisys appealed.[7]

II. ANALYSIS

A. *Standard of Review*

Much of the appellants' argument is thwarted by that most fundamental element of the appellate review process: the appropriate standard of review. The latitude afforded us to review a district judge's decision whether or not to impose Rule 11 sanctions is so narrow that we may reverse the judge's decision only if we find that he has abused his discretion. *Cooter & Gell Hartmarx Corp.*, 110 S. Ct. 2447, 2461 (1990); *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc). This standard of review applies both to the district court's findings of fact and legal conclusions in a Rule 11 case. The Court in *Cooter & Gell* recognized the often intertwined nature of factual and legal determinations in the context of a Rule 11 motion (e.g., the question whether an attorney made a reasonable inquiry into the factual and legal underpinnings of a pleading), and expressly declined to craft differing standards of appellate review of each. *Id.* at 2459. We may, of course, correct the district court's errors of law, for we "would be justified in concluding that, in making such errors, the district court abused its discretion." *Id.* Thus, the abuse of discretion standard amply guides us in reviewing all determinations the district court could have made in ruling on the motion, regardless of the difficulty we might encounter in characterizing any particular finding or conclusion as necessarily one grounded in fact or law. *See id.* at 2461 ("[a] district could would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence"). With our mandate to review the district

---

[7] Plaintiffs did not appeal the denial of their sanctions motion.

court's decision deferentially firmly in mind, *see id.* at 2459, we proceed to analyze the reasons appellants contend the district court exceeded its authority.

B. *Violation of Rule 11*

(1)

Appellants' chief contention, and one over which the parties have spent much time arguing, concerns the interrelationship between Rule 11 and Rule 41(a)(1). Appellants contend that Rule 41 does not grant an absolute right to one free dismissal. Therefore, they believe it follows that evidence of Maloney's filing of multiple identical lawsuits on the same day with the intention of dismissing one under Rule 41 constitutes a violation of Rule 11.

The district court's judgment, however, adequately rests on its finding of fact, which is not clearly erroneous,[8] that the Tyler action was filed inadvertently. The defendants have consistently pressed the point that the plaintiffs' overall conduct in the three cases, including all their actions in the various district courts in which they have filed papers, constitutes sanctionable conduct subject to the orders of the district court in Tyler. But the district court in Tyler, which held the hearing and entered the judgment under review here, plainly found that plaintiffs' counsel committed no sanctionable acts in their filing of the complaint in the Tyler action. We therefore need not assess the effect under Rule 11 of multiple filings in various district courts, as it was not necessary for Judge Steger, having found that the filing in his court was

[8] In his testimony Maloney stated that he made a decision not to file in Tyler, but that a complaint nevertheless was filed there due to the mistake of a paralegal who thought, after talking with Maloney, that a complaint should have been filed in the Eastern District in Tyler. The district judge had an opportunity to observe Maloney's demeanor and assess his credibility, and normally is in the best position to evaluate the parties' conduct. *See Henderson v. Department of Public Safety & Corrections*, 901 F.2d 1288, 1295 (5th Cir. 1990).

simply a mistake, to pass judgment upon the effect of plaintiffs' counsel's filings in other courts. If, indeed, there was any sanctionable conduct in those courts—and we do not suggest that there was—it would be more appropriately addressed by a court directly concerned with something more than a mistake.

(2)

We also believe the district court did not abuse its discretion in determining, under the circumstances of this case, that no Rule 11 violation took place when the attorneys' secretaries signed the complaint in the Tyler action. We note that the defendants never explicitly raised the issue of the secretaries' signatures until their post-hearing brief to the district court. If, as the district court found, there was never any intent to file the Tyler complaint, the lack of an attorney signature cannot have affected the defendants in any way. While we wish to emphasize that under normal, and even abnormal, circumstances it is the attorney's obligation to ensure that his own signature appears on the pleadings, motions and other papers, we find no basis in Rule 11 from which to conclude that a pleading filed by mistake should lead to sanctions for lack of an attorney signature, especially where the mistake was unrelated to the lack of a signature.

C. *Violation of 28 U.S.C. § 1927*

Finally, we briefly address appellants' contention that the plaintiffs unreasonably multiplied the proceedings in this case in violation of 28 U.S.C. § 1927. As we have discussed, the district court found that the filing in Tyler was an inadvertent mistake. The standard of review here is the same as for Rule 11 violations, *see Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 907 (5th Cir. 1987), and, in view of what we have said above about the alleged Rule 11 violation, we cannot say the district court abused its discretion.

III. CONCLUSION

Because we find that the district court did not abuse its discretion in any aspect of its decision on the Rule 11 motion, we AFFIRM the district court's order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TY-90-188-CA

LAWRENCE M. BAREFORD, *et al.*

VS.

GENERAL DYNAMICS CORP., *et al.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Entered October 12, 1990]

On this day came on to be considered the defendants' and plaintiffs' motions for sanctions. After careful consideration, the Court is of the opinion that the following disposition of those motions is appropriate. Any finding of fact that constitutes a conclusion of law shall be deemed a conclusion of law. Any conclusion of law that constitutes a finding of fact shall be deemed a finding of fact.

I. *Findings of Fact*

1) This case was originally filed on April 26, 1990 in the Eastern District of Texas, Tyler Division.

2) At the same time this case was filed, two other identical actions were also filed. One of those actions was filed in the Eastern District of Texas, Beaumont Division, and the other action was filed in the Southern District of Texas, Galveston Division.

3) The District Clerk's Office for the Eastern District of Texas informed this Court of the simultaneous filing of the case in Beaumont, and this Court referred the matter to Chief Judge Robert M. Parker to determine which

of the cases pending in the Eastern District should remain on the docket and which case should be dismissed.

4) Judge Parker determined that the case filed first should remain on the docket. The instant case was filed at 9:34 a.m. on April 26, 1990, and the case in Beaumont was filed at 11:09 a.m. on April 26, 1990. Consequently, Judge Parker entered an order on May 1, 1990 dismissing the action filed in Beaumont.

5) On May 4, 1990, the plaintiffs filed a voluntary notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(i). The instant case was consequently closed on that date.

6) On that same date, this Court entered an order, *sua sponte*, requiring the parties to appear for a sanctions hearing to determine if other identical actions had been filed and to determine if the plaintiffs had filed any other voluntary notices of dismissal pursuant to Rule 41(a)(1)(i). If the plaintiffs had filed more than one voluntary notice of dismissal, the second such notice would have acted as a final adjudication on the merits.

7) In order to determine whether the plaintiffs had engaged in any impermissible conduct, this Court's May 4, 1990 order specifically required the plaintiffs to show:

> a) whether or not other cases had been filed in other districts or states in which any of the plaintiffs were the same as those pled in the instant cause of action and alleging the identical claims, and
>
> b) which of those cases, if any, had been voluntarily dismissed by a plaintiff or plaintiffs.

In response to this order, the counsel for plaintiffs, Michael J. Maloney (Maloney), filed an affidavit and letter with the Court in which he stated that his intent was to file in Beaumont and not in Tyler.

8) Maloney further stated that the Tyler filing had been a mistake on the part of an overzealous paralegal.

He also claimed that only one notice of dismissal had ever been filed and that the case was "now filed in the Galveston District Court." Neither the affidavit nor the letter revealed the fact that the Galveston action had been filed simultaneously with the other two actions.

9) Based on Maloney's affidavit and letter, this Court entered an order on May 11, 1990 vacating its previous order setting a contempt hearing.

10) On May 15, 1990, a "Praecipe" was filed informing the Court that the action in Galveston had been filed on the same day as the other actions.

11) On June 28, 1990, General Dynamics, Hughes Aircraft, and Unisys Corporation filed a formal motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. Their motion alleged that sanctions should be imposed against plaintiffs' counsel because: a) they had filed three simultaneous actions; b) Maloney had filed a misleading letter and affidavit with the Court, and c) there was an inadequate investigation supporting the three original complaints.

12) On August 3, 1990, R. Doak Bishop of the law firm of Hughes and Luce sent this Court a letter requesting that the Court set a hearing date or otherwise rule on the defendants' motion for sanctions.

13) On August 14, 1990, this Court issued an order setting a hearing on the defendants' motion for sanctions for August 24, 1990 at 9:00 a.m.

14) On August 20, 1990, the plaintiffs filed their own motion for sanctions, pursuant to Rule 11, alleging that the actions taken by the defendants were designed to harass the plaintiffs and gain an unfair economic advantage. The plaintiffs also asserted that the defendants failed to make reasonable inquiry.

15) During the August 24, 1990 hearing, Maloney, lead counsel for plaintiffs, stated that he had originally

prepared four identical complaints, one complaint for the Federal District Court for the Western District of Texas, Austin Division, one complaint for the Southern District of Texas, Galveston Division, one complaint for the Eastern District of Texas, Tyler Division, and one complaint for the Eastern District of Texas, Beaumont Division.

16) Maloney claimed that he only intended to file two of the complaints, and partially depending on which two judges drew the cases, Maloney would then dismiss one of the cases pursuant to Federal Rule of Civil Procedure 41(a)(1)(i).

17) Maloney's office inadvertently filed the Tyler complaint.

18) The original complaint filed in this case was not signed by any one of the three attorneys of record. The secretary for each attorney signed the complaint in each attorney's name and at each attorney's request.

19) The plaintiffs conducted an adequate pre-filing investigation in this case. The mere fact that the plaintiffs chose to amend their Galveston complaint and drop several defendants from the law suit does not merit the imposition of sanctions or demonstrate inadequate pre-filing investigation.

20) The filing of more than one complaint in this case did not violate 28 U.S.C. § 1927 by unreasonably or vexatiously multiplying the proceedings in this case.

21) While the pleadings and papers filed by plaintiffs' counsel were unartfully drafted, counsel did not intentionally mislead or misrepresent matters to this Court.

II. *Conclusions of Law*

1) This Court has jurisdiction to decide the pending motions for sanctions despite the voluntary dismissal of the underlying cause of action. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2455 (1990).

2) Rule 41(a)(1)(i) gives a plaintiff the absolute right to dismiss an action one time by filing a voluntary notice of dismissal before a defendant has answered or moved for summary judgment. *Carter v. United States*, 547 F.2d 258, 259 (5th Cir. 1977); *Cooter*, 110 S. Ct. at 2455. As far as this Court can determine, the plaintiffs have only filed one voluntary notice of dismissal in this or any other related action.

3) The defendants are basing their motion for sanctions on two different but related grounds. The first ground is Federal Rule of Civil Procedure 11. The second ground is 28 U.S.C. § 1927. In pertinent part, Rule 11 provides as follows:

> Every pleading, motion, and other paper of a party represented by an attorney *shall be signed by at least one attorney of record* in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, *and that it is not interposed for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own inititaive, shall impose upon the person who signed it, a representative party, or both, an appropriate sanction . . . .

FED. R. CIV. P. 11 (emphasis added). Misrepresenting facts to the Court or intentionally deceiving the court can be grounds for sanctions. *See Gas Reclamation, Inc. v. Jones*, 113 F.R.D. 1, 4 (S.D. Tex. 1985); *see also Pressey v. Patterson*, 898 F.2d 1018, 1023 n. 5 (5th Cir. 1990);

Click v. Abilene Nat'l Bank, 822 F.2d 544, 545 (5th Cir. 1987). First, plaintiffs' counsel did not intentionally deceive the Court. Second, plaintiffs' counsel did not file any pleading or paper for an improper purpose. Third, although the original pleading filed in this case was not personally signed by any one of the three attorneys of record, the pleading was signed by each attorney's secretary in each attorney's name and at each attorney's request. This satisfies the requirement that every pleading, motion, or other paper must be signed by at least one attorney of record. Finally, plaintiffs' counsel did conduct adequate pre-filing investigation in this case. For these reasons, the Court finds that plaintiffs' counsel did not violate Federal Rule of Civil Procedure 11.

4) 28 U.S.C. § 1927 provides that any attorney who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy, personally, the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct. The Court finds that plaintiffs' counsel has not violated 28 U.S.C. § 1927.

5) The Court is of the opinion that defendants' motion for sanctions should be denied.

6) The Court is of the opinion that plaintiffs' motion for sanctions against the defendants has no merit and should be denied.

It is, therefore, ORDERED that the defendants' motion for sanctions be DENIED. It is, further,

ORDERED, that the plaintiffs' motion for sanctions be DENIED.

SIGNED this 11th day of October, 1990.

/s/ William M. Steger
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TY-90-188-CA

LAWRENCE M. BAREFORD, *et al.*

vs.

GENERAL DYNAMICS CORP., *et al.*

ORDER

[Entered May 7, 1990]

On this day the Court, *sua sponte*, orders the attorneys for plaintiffs to appear before the Court so that the Court may determine whether sanctions should be imposed pursuant to Federal Rule of Civil Procedure 11.

The plaintiffs filed this action on the same day that they filed an identical action in the Beaumont Division of the United States District Court for the Eastern District of Texas. When the case in Beaumont was dismissed by Chief Judge Robert M. Parker, due to the fact that the Beaumont case was filed subsequent to the case filed in the Tyler Division, and the instant case was assigned to this Court, the plaintiffs instantly filed a notice of dismissal. The Court views these facts as raising the question of whether the plaintiffs have engaged in an attempt to thwart the case assignment process used in the Eastern District of Texas and engage in impermissible forum shopping. Of course, the Court realizes that the plaintiff has an absolute right to file a notice of dismissal *one time* for dismissal without prejudice. FED. R. CIV. P. 41(a)(1). However, the Court also has the absolute right to insure that only one such notice of dismissal has been filed.

Under Federal Rule of Civil Procedure 11, the Court, on its own initiative, may determine whether to impose sanctions. FED. R. CIV. P. 11. As previously set out, the plaintiffs have engaged in conduct that raises the inference of impermissible forum shopping. By filing their notice of dismissal, the plaintiffs and their attorneys are, in effect, claiming that their notice of dismissal, filed with this Court, is the first such notice filed with any court, state or federal, in any action based on or including the same claim. *See* FED. R. CIV. P. 41(a)(1).

To insure that the Federal Rules of Civil Procedure have been properly complied with, it is, therefore, ORDERED that plaintiffs' attorneys appear before this Court on May 14, 1990 at 9:00 a.m. The plaintiffs will be required to show:

1) whether or not other cases have been filed in other districts or states in which any of the plaintiffs are the same as those pled in the cause of action numbered TY-90-188-CA and alleging the identical claims set forth herein, and

2) which of those cases, if any, have been voluntarily dismissed by a plaintiff or plaintiffs.

SIGNED this 4th day of May, 1990.

/s/ William M. Steger
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TY-90-188-CA

LAWRENCE M. BAREFORD, *et al.*

vs.

GENERAL DYNAMICS CORP., *et al.*

ORDER

[Entered May 11, 1990]

On this day came on to be considered this Court's order, dated May 4, 1990, which set a hearing to determine whether sanctions should be imposed against the plaintiffs' attorneys pursuant to Federal Rule of Civil Procedure 11.

Plaintiffs' attorney, Michael J. Maloney, has filed an affidavit with this Court in which he swears that the notice of dismissal filed in this action is the only notice of dismissal ever filed by any plaintiff. Federal Rule of Civil Procedure 41(a)(1) allows plaintiff to file such a notice to dismiss without prejudice one time. The Court is now satisfied that plaintiffs have only filed one such notice and have not engaged in impermissible forum shopping to date. It is, therefore,

ORDERED that this Court's order, dated May 4, 1990, which set a hearing to determine whether rule 11 sanctions should be imposed, is hereby VACATED.

SIGNED this 11th day of May, 1990.

/s/ William M. Steger
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TY-90-188-CA

LAWRENCE M. BAREFORD, *et al.*

vs.

GENERAL DYNAMICS CORP., *et al.*

ORDER

[Entered August 15, 1990]

After careful consideration, this Court is of the opinion that a hearing on the defendants' June 28, 1990 Motion for Sanctions must be scheduled. The Court is of the opinion that this matter must be finally resolved. It is, therefore,

ORDERED that the defendants' Motion for Sanctions be set for hearing on August 24, 1990 at 9:00 a.m.

SIGNED this 13th day of August, 1990.

/s/ William M. Steger
United States District Judge

FISHER, GALLAGHER, PERRIN & LEWIS
ATTORNEYS AT LAW

70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, Texas 77002
(713) 654-4433

Michael J. Maloney

May 10, 1990

Via Federal Express
Honorable William M. Steger
United States District Judge
Eastern District of Texas
Tyler Division
211 West Ferguson
Tyler, Texas 75702

Re: C.A. No. TY-90-188-CA; Lawrence M. Bareford, et al. v. General Dynamics Corp., et al.

Dear Judge Steger:

Pursuant to my conversation with your law clerk, Robert Davis, I have enclosed an affidavit which sets forth the record of voluntary dismissal of this case. As I explained to Robert, my intent was to file this case in Beaumont, Texas. On my instructions, my secretray [sic] filed it in Beaumont on April 26, 1990. Unfortunately, I have a new paralegal, recently with a Dallas firm, who employed commendable but regretable [sic] initiative. Thinking that the Eastern District was in Tyler, she filed the same petition in Tyler. As soon as I was advised that the Beaumont matter was dismissed by Judge Parker, I filed a voluntary notice of dismissal under Rule 41(a)(1).

As you know, we rarely handle matters in Tyler, solely because of the difficulty in commuting from Houston to Tyler. There is no direct commercial air service from Houston and the distance makes it impossible to appear at 9:00 hearings unless we go up the night before.

We are temporarily refraining from filing in Houston Federal Court because of the severely overloaded docket there. The matter is now filed in the Galveston District Court. I sincerely regret any inconvenience we may have caused the Court and thank the Court for its indulgence.

Very truly yours,

/s/ M. J. Maloney
MICHAEL J. MALONEY

MJM/kd
Encl.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

C.A. No. TY-90-188-CA

LAWRENCE M. BAREFORD, *et al.*

v.

GENERAL DYNAMICS CORP., *et al.*

AFFIDAVIT

[Entered May 11, 1990]

STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority on this date personally appeared MICHAEL J. MALONEY, who being duly sworn by me upon oath, deposed and said:

> My name is Michael J. Maloney. I am over eighteen years of age and I office at 1000 Louisiana, 70th Floor, Houston, Texas 77002. I am an attorney with the firm of Fisher, Gallagher, Perrin & Lewis. I have never been convicted of a crime. I am fully competent to make this Affidavit. I have personal knowledge of the facts stated herein and they are all true and correct. At all times material hereto, I was the attorney of record for the plaintiffs in cause no. TY-90-188-CA and the attorney most knowledgeable with the facts stated herein.
>
> In accordance with the Order of this Court, the undersigned affirms that only one other case has been filed on behalf of any or all of the Plaintiffs pled in the cause of action numbered TY-90-188-CA by the

law firm of Fisher, Gallagher, Perrin & Lewis in any other state or district. That claim is now pending in the United States District Court for the Southern District of Texas, Galveston Division.

The undersigned further affirms that only one voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1) has been filed by the firm Fisher, Gallagher, Perrin & Lewis on behalf of any plaintiffs pled in the cause of action no. TY-90-188-CA. That one voluntary notice of dismissal, pursuant to F.R.C.P. 41(a)(1) is the notice filed on the 5th day of May, 1990 in cause of action no. TY-90-188-CA.

Further Affiant sayeth not.

/s/ M. J. Maloney
MICHAEL J. MALONEY

SWORN TO AND SUBSCRIBED BEFORE ME on this 10th day of May, 1990.

/s/ Kay Dugas
KAY DUGAS
Notary Public
State of Texas
My Commission Expires
5/11/91

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. TY-90-188-CA

LAWRENCE M. BAREFORD, *et al.*

vs.

GENERAL DYNAMICS CORPORATION, *et al.*

PLAINTIFFS' NOTICE OF DISMISSAL

[Entered May 7, 1990]

COMES NOW, LAWRENCE M. BAREFORD, et al., Plaintiffs, by and through their attorney, Michael J. Maloney, in the above-entitled and numbered cause, and pursuant to Federal Rule of Civil Procedure 41(a)(1) files this Notice of Dismissal without prejudice.

Respectfully submitted,

FISHER, GALLAGHER, PERRIN
& LEWIS

By: /s/ M. J. Maloney
MICHAEL J. MALONEY
Federal I.D. #826
WAYNE FISHER
Federal I.D. #
1000 Louisiana, 70th Floor
First Interstate Bank Plaza
Houston, Texas 77002
(713) 654-4433
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TY-90-188-CA

LAWRENCE M. BAREFORD, Individually

ROLAND W. BOLDUC, Individually and as Temporary Administrator and Personal Representative of the Estate of Doran H. Bolduc, and on behalf of Mrs. Roland W. Bolduc, who also sues Individually, and on behalf of all other proper beneficiaries of Doran H. Bolduc

LEONARD CALKINS, Individually and as Temporary Administrator and Personal Representative of the Estate of Jeffrey L. Calkins, and on behalf of Mrs. Leonard Calkins, who also sues Individually, and on behalf of all other proper beneficiaries of Jeffrey L. Calkins

ROBERT A. CAOUETTE, Individually and as Temporary Administrator and Personal Representative of the Estate of Mark Robert Caouette, and on behalf of Mrs. Robert A. Caouette, who also sues Individually, and on behalf of all other proper beneficiaries of Mark Robert Caouette

KATHLEEN CILETTA, Individually and as Temporary Administratrix and Personal Representative of the Estate of John A. Ciletta, Jr., and on behalf of all other proper beneficiaries of John A. Ciletta, Jr.

[Filed April 26, 1990; Entered May 2, 1990]

---

* * * *

may show themselves justly entitled under the facts and circumstances.

Respectfully submitted,

By: M J Maloney
Michael J. Maloney
Federal ID No. 826

By: Wayne Fisher
Wayne Fisher
Federal ID No. 1875

By: Larry P Boyd
Larry Boyd
Federal ID No. 5345

OF COUNSEL:
FISHER, GALLAGHER, PERRIN & LEWIS
1000 Louisiana Street, 70th Floor
First Interstate Bank Plaza
Houston, Texas 77002
(713) 654-4433

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

B-90-00286-CA

LAWRENCE M. BAREFORD, Individually

ROLAND W. BOLDUC, Individually and as Temporary Administrator and Personal Representative of the Estate of Doran H. Bolduc, and on behalf of Mrs. Roland W. Bolduc, who also sues Individually, and on behalf of all other proper beneficiaries of Doran H. Bolduc

LEONARD CALKINS, Individually and as Temporary Administrator and Personal Representative of the Estate of Jeffrey L. Calkins, and on behalf of Mrs. Leonard Calkins, who also sues Individually, and on behalf of all other proper beneficiaries of Jeffrey L. Calkins

ROBERT A. CAOUETTE, Individually and as Temporary Administrator and Personal Representative of the Estate of Mark Robert Caouette, and on behalf of Mrs. Robert A. Caouette, who also sues Individually, and on behalf of all other proper beneficiaries of Mark Robert Caouette

KATHLEEN CILETTA, Individually and as Temporary Administratrix and Personal Representative of the Estate of John A. Ciletta, Jr., and on behalf of all other proper beneficiaries of John A. Ciletta, Jr.

[Entered April 26, 1990]

---

* * * *

may show themselves justly entitled under the facts and circumstances.

Respectfully submitted,

By: _____
Michael J. Maloney
Federal ID No. 825

By: _____
Wayne Fisher
Federal ID No. 1875

By: _____
Larry Boyd
Federal ID No. 5345

OF COUNSEL:
FISHER, GALLAGHER, PERRIN & LEWIS
1000 Louisiana Street, 70th Floor
First Interstate Bank Plaza
Houston, Texas 77002
(713) 654-4433
ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

G-90-118

LAWRENCE M. BAREFORD, Individually

ROLAND W. BOLDUC, Individually and as Temporary Administrator and Personal Representative of the Estate of Doran H. Bolduc, and on behalf of Mrs. Roland W. Bolduc, who also sues Individually, and on behalf of all other proper beneficiaries of Doran H. Bolduc

LEONARD CALKINS, Individually and as Temporary Administrator and Personal Representative of the Estate of Jeffrey L. Calkins, and on behalf of Mrs. Leonard Calkins, who also sues Individually, and on behalf of all other proper beneficiaries of Jeffrey L. Calkins

ROBERT A. CAOUETTE, Individually and as Temporary Administrator and Personal Representative of the Estate of Mark Robert Caouette, and on behalf of Mrs. Robert A. Caouette, who also sues Individually, and on behalf of all other proper beneficiaries of Mark Robert Caouette

KATHLEEN CILETTA, Individually and as Temporary Administratrix and Personal Representative of the Estate of John A. Ciletta, Jr., and on behalf of all other proper beneficiaries of John A. Ciletta, Jr.

[Entered April 26, 1990]

---

* * * *

may show themselves justly entitled under the facts and circumstances.

Respectfully submitted,

By: _____
Michael J. Malorey
Federal ID No. 836

By: _____
Wayne Fisher
Federal ID No. 1875

By: _____
Larry Boyd
Federal ID No. 5345

OF COUNSEL:
FISHER, GALLAGHER, PERRIN & LEWIS
1000 Louisiana Street, 70th Floor
First Interstate Bank Plaza
Houston, Texas 77002
(713) 654-4453
ATTORNEYS FOR PLAINTIFFS

MAY 15 '90 14:05 MC8C P.55/55